IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
Second Appeal NO.161 of 2004

Maruti Antu Koli,
since deceased through
legal heirs
Shankar Maruti Koli
& Others ..Appellants

versus

Hari Antu Koli,
since deceased
through legal heir
Smt. Pramila Hari Koli
& Others ..Respondents.

Mr.Sakhardande i/b. S.V.Lele for the Appellant

Mr. M.N.Dhamal for the respondent Nos.1A. 2 to 5

Coram : S.R.Sathe, J.
Dated : 26th September, 2007

P.C.

1. Heard finally at admission stage.

2. Heard both the learned advocates at length.

3. Perused the papers.

4. Appellant, the original defendants in Regular Civil Suit No.143 of 1980 have preferred this appeal against the Order passed in Regular Civil Appeal No.117 of 1976 by the 5th Addl. District Judge, Satara, whereby the decree for

partition and separate possession passed in favour of plaintiff was confirmed and the appeal was dismissed.

5. From the genealogy given in the plaint as well as in the written statement and from the submissions made before me, it is very clear that the relation between the plaintiffs and defendants was of step brothers and sisters. Admittedly, present plaintiffs had filed Regular Civil Suit No.127 of 1990 claiming that they are exclusive owners of the suit property on the basis of the Will executed by Antu Koli, ancestor of the plaintiffs and defendants. It is not in dispute that the said suit was dismissed and the appeal preferred against the same by the plaintiffs was also dismissed. However, in view of the observations made in the earlier proceedings and the directions given, the plaintiffs filed Regular Civil Suit No.143 of 1980 in the Court of C.J.J.D. Koregaon, for partition and separate possession alleging therein that plaintiffs being the co-owners have share in the suit property. The defendants opposed the said suit on several grounds. They contended that plaintiffs earlier suit No.127 of 1990 was finally decided and dismissed and as such the said decision operates as

res judicata and the present suit is not maintainable.

6. Besides this the defendants also contended that the suit property in question was regranted to Maruti, the original defendant No.1 and in view of the provisions of Bombay Inferior Village Watan Abolition Act, 1958, the suit lands cannot be partitioned. Hence, mainly on this ground defendants prayed for dismissal of the suit.

7. After considering the evidence adduced by both the parties, the learned trial Judge came to the conclusion that the plaintiffs 1 and 2 are entitled to 4/21 share each in the suit property. He, therefore passed preliminary decree and directed that it be sent to Collector for effecting partition as per the provisions of Section 34 of the CPC.

8. Being aggrieved by the above order, the defendants filed the present second appeal. In this appeal before me the learned Advocate for the appellant has urged only two points. Firstly he submitted that the finding recorded by the First Appellate Court on the point of res judicata is not

legal and correct. Secondly, he canvassed before me that the suit was not maintainable in view of the provisions of Section 5(3) of the Bombay Inferior Village Watan Abolition Act, 1958 and he therefore submitted that the appeal be allowed. As against this, the learned advocate for the plaintiffs supported the order passed by the First Appellate Court.

9. The only substantial question of law involved in this appeal is whether the suit is barred by the principal of res judicata and whether the same was liable to be dismissed in view of the provisions of Section 5(3) of the Bombay Inferior Village Vatan Abolition Act, 1953.

10. From the perusal of the judgment of the First Appellate Court, it is very clear that in the earlier suit the plaintiffs had in fact claimed exclusive ownership in respect of the suit lands on the basis of the Will executed by Antu Koli. However, plaintiffs case in that behalf was rejected in the said suit and the appeal preferred by the plaintiff was also dismissed. The plaintiff has claimed partition and separate possession in the

present suit lands on the basis of that he is the co-owner of the suit lands. It was therefore tried to be argued that the present suit was in fact barred by the provisions of Order II Rule 2 of CPC. However, admittedly, the earlier suit was dismissed and plaintiffs preferred Regular Civil Appeal No.43 of 1974. The plaintiff was permitted to convert the original suit into suit for partition and separate possession. So, in view of that direction instead of converting the suit, plaintiffs filed the present suit for partition and possession. So, the learned First Appellate Court rightly held that it cannot be said that the suit was barred by Order II Rule 2 of CPC.

8. The rights claimed by the plaintiffs in the earlier suit and the rights claimed by the plaintiff in the present suit are of different nature and they are totally distinct. So, merely because some of the parties to the earlier suit and the present suit are same, or some of the suit properties mentioned in the earlier suit are same, we cannot jump to the conclusion that the present suit is barred by principle of res judicata. In order to apply the provisions of Section 11 of CPC, it must be seen

whether all the essential ingredients of the said section are fulfilled. In the instant case the matter which was directly and substantially in issue in the earlier suit and the present suit are different. So, the learned Addl. District Judge has rightly observed that there is no substance in the contention of the defendants that the suit is barred by principle of resjudicata.

. So far as the application of Section 5(3) of the Bombay Inferior Village Vatan Abolition Act, 1958, is concerned, it would be worthwhile to see what the said section says. It runs as follows:

> **5. Regrant of Watan Land to holders of Watan.**
>
> "(3) The occupancy of the land regranted under sub-section (1) shall not be transferable or partible by metes and bounds without the previous sanction of the Collector and except on payment of such amount as the State Government may by general or spcial order determine."

Bare reading of the above section shows that there is no total bar or absolute bar for filing the suit for partition in respect of regranting land. All that is necessary is that before effecting the

actual partition necessary permission from the Collector is to be obtained and occupancy price is to be paid. So the said compliance can be made before actual partition of the property. The parties are certainly entitled to apply to the Collector in that behalf. So, under such circumstances I do not think that the plaintiffs claim can be negatived on that count.

. Thus, from the above discussion, I am of the view that both the courts below have rightly decreed the plaintiffs suit and there is no necessity to interfere with the said order.

. In this view of the matter, the appeal is dismissed.

(S.R.Sathe, J.)